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UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA,)	CR. NO. 03-00179-03 HG
)	
Plaintiff,)	GOVERNMENT'S SUPPLEMENTAL
)	RESPONSE TO DEFENDANT GOMES'
vs.)	MOTION FOR "MEDICAL EVALUATION
)	AND TREATMENT"; CERTIFICATE OF
)	SERVICE
JOSEPH GOMES,	(03))	
)	
Defendant.)	
)	
)	

GOVERNMENT'S **SUPPLEMENTAL** RESPONSE TO DEFENDANT GOMES'
MOTION FOR "MEDICAL EVALUATION AND TREATMENT"

A. INTRODUCTION

This pleading is submitted pursuant to a directive of the Court's Minute Order in the above-referenced matter (entered July 10, 2008), instructing Government counsel to provide the Court ". . . with the position of the United States as to the

District Court of Hawaii's jurisdiction to entertain the Defendant's Motion for Medical Evaluation and Treatment."

On June 11, 2008, Defendant JOSEPH GOMES filed (under seal) a motion styled as a "Motion for Medical Evaluation and Treatment," as an ancillary matter to the his above-referenced criminal case. On June 20, 2008, the Government filed its initial reply pleading, (1) objecting to Defendant GOMES' non-public litigation of his motion by filing the entire motion under seal¹, and, (2) arguing that any re-designation of GOMES' prison facility and/or any medical evaluation should be left to the discretion of the Bureau of Prisons.

Upon Defendant GOMES' subsequent filing of a supplemental memorandum in support of his sealed motion, the Court (by Minute Order entered July 10, 2008) ordered the pleadings unsealed, and, directed the Government to provide the Court with its position as to the District Court of Hawaii's jurisdiction to entertain Defendant GOMES' motion.

B. GOVERNMENT'S POSITION WITH RESPECT TO JURISDICTION

Our position is that the District Court is without jurisdiction to direct that a sentenced defendant be confined in a particular Bureau of Prison ("BOP") facility, or be placed in a

¹ Our position is that the litigation of the motion should be a public matter. This would not preclude filing sensitive supporting exhibits, such as medical records, as sealed exhibits to the motion, where appropriate.

particular BOP treatment program. We believe that such decisions are within the sole discretion of the BOP. See 18 U.S.C.

§ 3621(b); United States v. Restrepo, 999 F.2d 640, 644-45 (2nd Cir.), cert. denied, 510 U.S. 954 (1993); United States v. Voda, 994 F.2d 149, 151-52 (5th Cir. 1993). See also, United States v. Dragna, 746 F.2d 457, 458 (9th Cir. 1984), cert. denied, 469 U.S. 1211 (1985)². Once a defendant has been sentenced, custody of the defendant is turned over to BOP, and the defendant is then subject to the rules of that agency.

By statute, it is the role of BOP to determine a defendant's place of confinement (see 18 U.S.C. § 3621(b)). By reason of BOP's statutory decision making authority concerning the designation of a prison facility, this Court may only make a "recommendation," which among other factors, BOP must consider. See 18 U.S.C. § 3621(b)(4)(B); see also, Lyons v. Clark, 694 F. Supp 184, 186-87 (E.D. Va 1988).

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² Dragna was decided under the predecessor statute(s) to 18 U.S.C. § 3621(b), i.e., 18 U.S.C. §§ 4081 and 4082, which vested the authority to incarcerate and transfer federal prisoners within the discretion of the Attorney General of the United States.

C. CONCLUSION

Accordingly, our position is that any re-designation or medical evaluation as to Defendant GOMES must necessarily be left to the sound discretion of the Bureau of Prisons.

DATED: July 22, 2008, at Honolulu, Hawaii.

Respectfully submitted,

EDWARD H. KUBO, JR.
United States Attorney
District of Hawaii

By /s/ Louis A. Bracco
LOUIS A. BRACCO
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UNITED STATES OF AMERICA

CERTIFICATE OF SERVICE

I hereby certify that, on the dates and by the methods of service noted below, a true and correct copy of the foregoing was served on the following at their last known address:

Served Electronically by CM/ECF:

RICHARD S. KAWANA, ESQ. rskawana@prodigy.net July 22, 2008

Attorney for Defendant JOSEPH GOMES (03)

Served by Hand-Delivery:

Rosanne T. Donohoe July 23, 2008
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DATED: July 22, 2008, at Honolulu, Hawaii.

/s/ Shelli Ann H. Mizukami